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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

C3 ENTERTAINMENT, INC., Plaintiff and Appellant, v. COLUMBIA PICTURES TELEVISION, INC., et al., Defendants and Respondents.	B208179 (Los Angeles County Super. Ct. No. BC345917)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kevin C. Brazile, Judge, Richard Chernick, Temporary Judge (Pursuant to Cal. Const., art VI, § 21.) Affirmed.

Squires, Sanders & Dempsey, Douglas J. Rovens; Robert N. Benjamin, Adam Fox for Plaintiff and Appellant.

Sheppard Mullin Richter & Hampton, Martin D. Katz, Lisa N. Stutz, Richard F. DeLossa for Defendants and Respondents.

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C3 Entertainment, Inc. sued respondent Sony Pictures Television, Inc.[1] for breach of two contracts. The case was heard before a referee pursuant to Code of Civil Procedure section 638. The referee granted summary adjudication in Sony's favor on the cause of action for breach of one of the contracts. After trial on the remaining causes of action, the referee found some breach, but no damages. The referee's opinion was adopted by the court as its judgment. Sony then sought costs, seeking, inter alia, its share of the referee's fees. The trial court declined to make that award.

C3 appealed from the judgment, and Sony appealed from the fees order. On both appeals, we affirm.

Background

We are fortunate to be able to begin with an authoritative legal description of The Three Stooges, from the highest Court of our state: "Moe and Jerome (Curly) Howard and Larry Fein fashioned personae collectively known as The Three Stooges, first in vaudeville and later in movie shorts, over a period extending from the 1920's to the 1940's. (See Fleming, The Three Stooges: Amalgamated Morons to American Icons (1999) pp. 10-46.) The three comic characters they created and whose names they shared -- Larry, Moe, and Curly -- possess a kind of mythic status in our culture. Their journey from ordinary vaudeville performers to the heights (or depths) of slapstick comic celebrity was long and arduous. (*Ibid.*) Their brand of physical humor -- the nimble, comically stylized violence, the 'nyuk-nyuks' and 'whoop-whoop-whoops,' eye-pokes, slaps and head conks (see, e.g., Three Little Pigskins (Columbia Pictures 1934), Hoi Polloi (Columbia Pictures 1935), A Gem of a Jam (Columbia Pictures 1943), Micro-

[1] The actual defendants were Columbia Pictures Television, Inc., Sony Pictures Entertainment, and Columbia Pictures Industries, Inc. They and their predecessors are referred to herein as "Sony," with one exception: on Sony's motion under Code of Civil Procedure section 631.8, judgment was entered in favor of Sony Pictures Entertainment and Columbia Pictures Industries on the second cause of action. That ruling has not been appealed. C3 and its predecessors are referred to as "C3."

Phonies (Columbia Pictures 1945)) -- created a distinct comedic trademark. Through their talent and labor, they joined the relatively small group of actors who constructed identifiable, recurrent comic personalities that they brought to the many parts they were scripted to play." (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 399-400.)

Between 1934 and 1958, The Three Stooges made 190 Shorts, that is, films which were from 12 to 18 minutes long. They were produced by Sony. The copyright to the Shorts was for a time a matter of dispute, but it is now agreed that Sony holds the copyrights. C3 owns certain name, likeness, and intellectual property rights to The Three Stooges and is in the business of licensing and merchandising The Three Stooges.

The parties have thus been doing business together, and engaging in litigation against each other, for many years. This lawsuit alleges breaches of two contracts, one executed in 1960 (sometimes referred to as the Bridged Features Agreement) and one executed in 1996 (sometimes referred to as the Series Agreement).[2]

The 1960 Agreement settled a lawsuit about a film called *Stop! Look! and Laugh!*, which Sony had just produced. It was composed of Shorts plus other material. The Three Stooges had sought to enjoin release of the film, alleging that Sony had made it without license or permission. The 1960 Agreement gave Sony various rights regarding *Stop! Look! and Laugh!* and the "unlimited right to produce, exhibit, distribute or otherwise exploit, in any medium or by any method whatsoever, whether now known or hereafter discovered, feature motion pictures utilizing therefor and therein any or all short subjects featuring the performances of The Three Stooges," in return for payment of 25 percent of the proceeds.

The 1996 Agreement was not the result of a lawsuit. There was evidence that it followed the resolution of an inter-Stooge dispute concerning ownership of the intellectual property rights, in which C3 prevailed (and which meant that at least to some

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[2] This agreement, executed on July 14, 1996, is marked "as of July 14, 1995." It is sometimes referred to as the 1995 agreement.

extent, Sony had been making Three Stooges deals with the wrong party), and evidence that the agreement came about because Sony was interested in creating a television special and television series using the Shorts and "bridging" material.

Under the 1996 Agreement, C3 granted Sony the right to use The Three Stooges copyrights (which were still in dispute), names, likenesses, rights of publicity, and so on, and to cut, edit, or colorize the Shorts (as defined) and Features (capitalized but not defined) for purposes of making a television Special (defined) and one or more television Series (defined). The Series would "primarily utilize the Shorts" with the addition of bridging and other "interstitial material." As to the Series, C3 was to be compensated with a share of the adjusted gross receipts, as defined, with a $150,000 a year minimum guaranteed payment.

The 1996 Agreement provided that Sony had no obligation to make either a Special or a Series, but that if it did, it was obligated to "use its reasonable good faith efforts consistent with its business judgment to maximize the gross receipts of the same commensurate with their relative merit and marketability."

One more agreement is relevant, the 1997 Maui Settlement Agreement. In 1997, three other lawsuits between the parties were mediated, and settled, in Maui, where the climate is conducive to settlement. Among other things, this Agreement resolved the dispute concerning the copyright of the Shorts. It also provided that "the Parties hereby agree that (i) any dispute arising out of this Settlement Agreement and its implementation . . . shall be submitted to a private judge . . . pursuant to Code of Civil Procedure section 638." Sony's motion for judicial reference was made and granted under that provision.

In this lawsuit, C3 alleged several breaches of the 1960 Agreement, and several breaches of the 1996 Agreement.

The 1960 Agreement

One alleged breach was based on the fact that Sony distributed compilations of the Shorts (placed in sequence on VHS and DVD without any bridging material) in the home entertainment market. C3 alleged that this distribution fell under the 1960 Agreement, and that Sony had breached that agreement by failing to pay C3 sums due.

C3 also alleged that Sony breached the 1960 Agreement when it failed to pay C3 a portion of the revenue it received when it licensed the Shorts to two cable channels, AMC and Spike. This is the background: in 1999, Sony made a Series, sometimes called the Playhouse, which incorporated the Shorts and other material. In the spring of 1999, Sony licensed the Playhouse and the Shorts to AMC for a flat fee of $19 million. AMC extended its license to the Shorts, but not the Playhouse. It used the Shorts to make a series of half-hour programs, adding material obtained with the cooperation of C3. (C3 was compensated with commercials.) AMC paid Sony $3.85 million for the second license. In December 2004, Sony licensed the Shorts, but not the Playhouse Series, to Spike, a cable channel. Spike added interstitial material and made its own series of hour-long episodes, called the Slap Happy Hour. Spike did not work with C3 on that series.[3]

C3 alleged that the license of the Shorts, which AMC and Spike turned into series, fell under the 1960 Agreement.

Sony moved for summary adjudication on the ground that the agreement applied only to feature motion pictures, that that term meant full length motion pictures initially released for theatrical distribution, and thus that the Shorts licensed to AMC or Spike, and distributed in the home entertainment market did not fall under the Agreement.[4]

The 1996 Agreement

C3 alleged that Sony breached this agreement by failing to use reasonable good faith efforts to maximize gross receipts for the Playhouse Series in the home

[3] The court found that Sony objected to Spike's use of the Shorts, and also found that Spike's use of the Shorts in this way was inconsistent with the license.

[4] Sony also moved for summary adjudication on the ground that C3 had no standing to enforce the 1960 Agreement because it was not a party to that Agreement, an argument which the referee did not reach.

entertainment, TV syndication, basic cable, international cable and television, video on demand, and direct response markets.

C3 also alleged the AMC and Spike series were "Series" under the 1996 Agreement, so that it was entitled to payment under that agreement.

The referee found that the AMC and Spike series were not Series under the 1996 Agreement. On the efforts clause, the referee found no breach in any market except the home entertainment market. The referee also found that while it was clear that some damages were proximately caused by the breach, C3 had not proved proximately caused non-speculative damages, and did not award damages for the breach.

Discussion: The Appeal

1. *The 1960 Agreement*

Facts

This agreement granted Sony the "unlimited right to produce, exhibit, distribute or otherwise exploit, in any medium or by any method whatsoever, whether now known or hereafter discovered, feature motion pictures utilizing therefor and therein any or all short subjects featuring the performances of The Three Stooges," in return for payment of 25 percent of the proceeds of those pictures.

Sony's motion for summary adjudication proposed that "feature motion picture" meant a full length theatrically released motion picture. The motion was supported by, inter alia, a copy of the complaint in the lawsuit which the Agreement settled, the definition of "feature" or "feature film" in dictionaries and film reference books (with publication dates from 1976 to 1995), and facts concerning the AMC programming, the Spike programming, and the home entertainment product distributed by Sony. Sony also argued that the existence of the 1996 Agreement, which applied to television, established that the 1960 Agreement did not apply to product intended for television.

In response, C3 submitted evidence of interpretations of the 1960 Agreement found in 2003 correspondence from Sony attorney Jared Jussim to C3 and Jussim's, and

C3 President Earl Benjamin's, deposition testimony in this case, and a declaration from an attorney, Steven Madoff, who had been practicing entertainment law in various capacities since 1982, and who declared, inter alia, that in the entertainment industry the terms "feature" and "motion picture" were not limited to full length theatrical motion pictures, but were broader terms which did not indicate a specific length of the motion picture, and might be intended for distribution in one or more venues. Sony's objections to Madoff's declarations were sustained.

The referee found that "feature motion picture" was unambiguous "at least insofar as the claim that the Shorts singly or together constitute a 'feature motion picture' . . . The common sense meaning of a 'feature motion picture' -- a film intended to be exhibited in a theatre as the 'feature' or principal film for a given program of filmed entertainment -- can be derived from the face of the Agreement as its so-called 'plain meaning.' A short subject is never thought of as the 'feature' of a program of filmed entertainment. Even in combination, so that they become the length of a 'feature,' short subjects would not ordinarily be thought of as 'feature motion picture,' but the Agreement in fact makes such an amalgam, with or without bridging material, potentially a 'feature motion picture' if it in fact is compiled for exhibition in a theatre for that use."

The referee next found that this interpretation was supported by the context in which the Agreement was made, that is, the underlying lawsuit, and by the dictionary definitions proffered by Sony. The referee concluded, "the Shorts are not a 'feature motion picture' unless they are of feature length and intended to be shown as a 'motion picture,' also known as a 'theatrical motion picture.'"

Analysis

The rules governing the role of this court in interpreting a written instrument are well established. We consider all the terms of the contract, and interpret the contract to give effect to the mutual intent of the parties at the time they made the contract. This intent is to be ascertained from the writing alone, if that is possible. (Civ. Code, §§ 1636, 1638, 1639, 1641.) Extrinsic evidence is admissible to interpret an agreement when a material term is ambiguous. (*Wolf v. Walt Disney Pictures and Television* (2008) 162 Cal.App.4th 1107, 1125-1126.) "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret." (Code Civ. Proc., § 1860.)

The 1960 Agreement grants Sony the right to "produce, exhibit, distribute or otherwise exploit, *in any medium or by any method whatsoever, whether now known or hereafter discovered*, feature motion pictures . . . ." (Emphasis added.) Limiting "feature motion picture" to feature motion pictures which have theatrical release would nullify the express provision that Sony's rights (and obligations) extend to feature motion pictures exhibited or exploited in "any medium or by any method whatsoever." Those terms are not ambiguous, and cannot be read to mean "theatrical release," or, as Sony suggests, theatrical release as the initial release.

Extrinsic evidence cannot be used to vary the terms of the agreement (*Wolf v. Walt Disney, supra,* 162 Cal.App.4th at p. 1126) and at any rate, definitions of "feature" or "feature film" published many years after the parties entered into the agreement is of little evidentiary value. We say the same about the recent deposition testimony of lawyers not involved in negotiating the agreement.

Sony makes several arguments to the contrary: From the fact that this agreement settled a lawsuit about a motion picture for theatrical release, Sony concludes that the Agreement reaches only motion pictures for theatrical release. We agree that the *Stop! Look! and Laugh!* lawsuit is one of the "circumstances under which [the contract] was made," but when we look at all the circumstances, we do not reach Sony's conclusion.

The underlying lawsuit alleges that The Three Stooges had made "short subject motion pictures," that Sony had produced a "feature motion picture" called *Stop! Look! and Laugh!* which incorporated parts of those short subject motion pictures and that Sony had used parts of the short motion pictures to make trailers for *Stop! Look! and Laugh!* and had used The Three Stooges' names and appearance in publicity for that picture. The allegation is that Sony did all of that without license or permission, and unless restrained by the court would release *Stop! Look! and Laugh!* for theatrical release.

None of that says the parties intended "feature" to mean a feature intended for theatrical release. Indeed, because the complaint bothers to specify that Sony intended theatrical release for the *Stop! Look! and Laugh!*, it indicates that "feature" by itself does not necessarily include theatrical release. It was also undisputed at summary adjudication that in 1960, The Three Stooges had been been involved in at least one television production. The parties could have specified that the Agreement applied only to theatrical release, and not to television. They did not, but chose to have the agreement apply broadly.

Sony also makes arguments based on the 1996 Agreement, citing the rule that "[W]hen a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court." (*Universal Sales Corp. v. California Press Mfg. Co.* (1942) 20 Cal.2d 751, 761-762, *City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375.) Sony argues that the fact that the parties later entered into an agreement concerning television means that the 1960 Agreement did not concern television.

The main problem with the argument is that the 1960 Agreement is unambiguous on this point, so that extrinsic evidence of any kind may not be considered. Further, the evidence concerning the 1996 Agreement is complicated.

That agreement was made when the copyrights to the Shorts were still in dispute. In a May 2003 letter from Sony lawyer Jussim to C3 President Benjamin, referring to previous correspondence (apparently about colorization of the Shorts) Jussim refers to the 1996 Agreement as "the TV Agreement," and writes that "As you know, the right of [Sony] to combine the Three Stooges Shorts with bridging or other interstitial material was the subject of a lawsuit, ultimately settled between [Sony] and your predecessors in interest. The license to Columbia provided under the TV Agreement was made in light of the October 14, 1960 Settlement Agreement and to assure [Sony] that it had the right to produce the Specials and the Series as described in the TV Agreement, and to utilize the Shorts and the Features in any way that seems appropriate for the production of such Series and the Special." It seems that Sony was unsure of the meaning of the 1960 agreement.

We also note that while the 1996 Agreement grants Sony rights to cut, edit, colorize and combine "the Features," just as it does the Shorts, and capitalizes "Feature," it does not define that term. Given that the 1996 Agreement also uses the term "theatrical motion picture," we may infer that the two terms have different meanings.

Having decided that the 1960 Agreement applies to "feature motion pictures" no matter how distributed, we must next consider whether Sony distributed "feature motion pictures" when it distributed DVDs or tapes of the Shorts. We conclude it did not. The 1960 Agreement recognizes two kinds of product, Shorts and feature motion pictures. It allows Sony to create a feature motion picture from the Shorts, but does not address distribution of the Shorts themselves. Distribution of the Shorts cannot be said to fall under the Agreement, and the Shorts cannot be said to be feature motion pictures, even when more than one Short is placed on a DVD.

Nor do we agree with C3 that because Sony knew that AMC and Spike would bridge the Shorts, the licenses of the Shorts were licenses of bridged features. Leaving aside the question of whether half-hour or hour-long programs are "features," nothing in the 1960 Agreement address the licensing of the Shorts, or required Sony to pay C3 when it did so.

2. *The 1996 Agreement*

a. The AMC and Spike series

C3 also argues that the series AMC and Spike created from the Shorts fell under the 1996 Agreement, so that it is entitled to a portion of the license fees those entities paid for the Shorts.

The agreement defined "series" as "one (1) or more television series consisting of one-half (1/2) hour episodes which [Sony] contemplates producing which would primarily utilize the Shorts with the addition of newly produced bridging and other interstitial material consisting of clips and extracts from existing material, whether owned by [Sony] or [C3] or other entities." We think that C3's argument fails on the plain wording of the Agreement, which applies to television series "which [Sony] contemplates producing." Sony did not produce either the AMC or the Spike programs, and neither fall under the 1996 Agreement.

C3 focuses on the word "contemplates," and argues that it "infuses the definition [of Series] with flexibility such that a Series may be produced by another at Sony's behest or with its permission . . . ." Leaving aside the evidentiary issues (were the AMC or Spike series produced at Sony's behest or with its permission?) we simply cannot see that "contemplates" changes the meaning in that way. The Agreement applies to series which Sony produces. A license of the Shorts is not a license of a Series, even if the licensee creates a series, and a license of the Shorts is not covered by the 1996 Agreement.

C3 makes several arguments to the contrary. As to AMC, C3 cites the fact that Sony initially allocated to the 1996 Agreement a large part of the $3.85 million license fee, and argues that Sony thus acknowledged that the AMC program was a Series under that Agreement. C3 also cites an exchange of letters, in March 2000, between C3 and Sony concerning the AMC series, which in C3's view establish that it informed Sony that it understood that AMC was going to turn the Shorts into a Series which would fall under the Series Agreement, and that it agreed to the arrangement and was working with AMC on that basis, and that Sony did not disagree, but instead (through a discussion of credits) behaved as though the AMC series was a Series.

As Sony reads the correspondence, it never agreed that AMC was producing a series which would fall under the 1996 Agreement. Sony agreed that it initially allocated a portion of the AMC fee to the 1996 Agreement, but cites the evidence that this was an accounting error.

We need not delve into this dispute, because we cannot see that it influences the result here. C3's argument has the ring of estoppel, but C3 does not claim estoppel, and we see none, if only because C3 has made no showing of detrimental reliance. (*Youngman v. Nevada Irr. Dist*. (1969) 70 Cal.2d 240, 249.) That is, C3 contends that it agreed to the AMC series because Sony was treating the AMC series as a Series, but C3 does not show that its agreement was necessary or that it gave up any right. C3 contends that it worked with AMC because Sony was treating the AMC series as a Series, but it was compensated for its work with AMC.

C3 also seems to contend that Sony's conduct is relevant to interpret the 1996 Agreement. We do not find it so. The 1996 Agreement unambiguously applies only to series which Sony produces, not to series others produce from the Shorts. Parol evidence cannot be used to vary the contract. (*Wolf v. Walt Disney Pictures and Television, supra,* 162 Cal.App.4th at pp. 1125-1126.)

The basic problem with C3's arguments is that the 1996 Agreement does not address Sony's activities with regard to the Shorts. That may be because the dispute about the copyright of the Shorts had not been resolved when the Agreement was negotiated and signed. It may be because the parties anticipated that a licensee of the Shorts would naturally turn to C3, and its intellectual property, if it wished to create any new series. There may be another reason. We cannot know. We do know, because the Agreement is clear, that licenses of the Shorts are not covered by the Agreements.

b. The efforts clause

The 1996 Agreement provided that Sony had no obligation to produce either the Special or a Series but that "notwithstanding the foregoing, once [Sony] had produced . . . any episodes of the Series, [Sony] shall use its reasonable good faith efforts consistent with its business judgment to maximize the gross receipts of the same commensurate with their relative merit and marketability."

C3 alleged that Sony breached this "efforts" provision in six markets, TV syndication, basic cable, international cable and television, video on demand, home entertainment, and direct response.

The referee found that the clause was less than a best efforts clause, and imposed on Sony only the obligation to act reasonably, consistent with its business judgment, to maximize gross receipts commensurate with the relative merit and marketability of the Series, that "relative" meant "by comparison with other similar product in the [Sony] library and other similar product owned by competitors in the market place," and that the clause "did not prevent or limit Sony's obligation to market and distribute other product, including the Shorts."

As to the domestic TV syndication market, the domestic basic cable market, and the international cable and television market, the referee found that C3 did not establish that Sony failed to use reasonable good faith efforts, and also found that as to those markets, C3 did not establish that the result would have been materially different if greater or different efforts had been expended. As to the video on demand market, the court found that C3 offered no evidence that Sony's efforts were less than the Agreement required, and that the claim was not established.

As to the home entertainment market, the referee found that Sony did not use reasonable good faith efforts, but also found that while "some damages" were proximately caused by Sony's breach, C3 had not proved proximately caused non-speculative damages.

C3 first argues that the court misconstrued the efforts clause and held Sony to a standard less than that which the Agreement actually required. However, in each instance in which the court found no breach, the court also found that additional efforts would not have yielded greater revenue, a finding which C3 does not challenge. We thus need not concern ourselves with this argument, except to address two issues, once again, the AMC and Spike licenses of the Shorts.

C3 argues that "the clear evidence and the purpose of the Series Agreement, which if applying the efforts provision correctly, contemplated modifications to the Series to serve the buyers and help market and distribute the Shorts by repackaging them for television." In other words, C3 argues that the efforts clause required Sony to modify the series it had already produced, or to create a new one, if a potential licensee of the Shorts wished to add material and create a series, and that by failing to do so with regard to AMC and Spike, Sony breached the Agreement.

This would be a very broad reading indeed, and one not justified by the language of the Agreement. A requirement that Sony use "reasonable good faith efforts consistent with its business judgment to maximize the gross receipts of" the Series cannot be read as an obligation to create a new series for a potential licensee of the Shorts. Indeed, under the 1996 Agreement, Sony had no obligation to make a series of any kind.

As to Spike, C3 also cites the evidence that Sony did not even try to sell the Playhouse Series to Spike, although it knew that Spike intended to create a series like the AMC series. C3 argues that this, at least, violated the efforts provision. Even if that were so, the court had before it evidence that Spike would not under any circumstances have licensed the Playhouse Series, because it could not afford to do so, and in any event did not want a half-hour series. Even if the court erred in finding no breach, there is substantial evidence for the finding that even if there was a breach, there were no damages.

The same is clearly true of AMC, which initially licensed the Series, but never broadcast any of it, and did not renew its license, choosing to make its own series.

c. The home entertainment market

C3's damages expert was Steven Madoff, an attorney with long experience in the entertainment industry. He testified to his background and expertise, his research into such areas as the popularity and potential market for the Playhouse Series (based on sales figures for Shorts in the public domain, ratings for the AMC and Spike series, The Three Stooges fan clubs and web sites, and interest in The Three Stooges from advertisers and movie producers), DVD sales figures for television series he believed were comparable, and similar matters.

Sony challenged Madoff's expertise. The referee allowed the testimony, saying "I think he's demonstrated the expertise generally, but it goes to the weight in this case as to how he actually applied his experience in coming to the judgment that he did."

Madoff opined that Sony could have sold 300,000 units a year, with a price point of $15 per unit, a unit being 20 episodes of the Playhouse Series in an attractive box, with additional material, attractive to collectors.

Madoff was heavily cross-examined, and Sony introduced evidence of sales figures for many other series. Sony also introduced evidence (and we cannot see that it was disputed) that under the 1996 Agreement, for the home video market, over 153,000 units, at $15 per unit, would have to be sold in order for C3 to receive any payment above the guaranteed minimum of $150,000.

The referee found that Madoff's opinion on the unit price of $15 "was offered . . . with scant factual or other non-anecdotal support." As to Madoff's opinion on the number of units which could be sold, the referee found that Madoff relied primarily on the sales figures for *I Love Lucy*, *The Honeymooners* and *The Andy Griffth Show*, and that "the claimed comparability of these three products to the Series is a conclusion that is unsupported by anything other than Madoff's opinion." The referee also noted that Madoff disregarded sales figures for the Shorts, and did not consider the home entertainment market sales of *Abbott and Costello* or *Laurel and Hardy*, arguably comparable.

The referee concluded that "only the roughest approximation of the magnitude of possible sales volume may be divined from these facts," that "No one could consider all this testimony and conclude that 250,000 or 300,000 units per year is in the 'ballpark' of possible outcomes. This information is insufficient foundation for an expert opinion . . . ," and that "there are no reliable reference points as to price or units. In the end, the Referee is faced with the choice to pick an average number of units per year that

[Sony] could have achieved without any real guidance from the evidence or to reject the damage model." Thus, no damages were awarded.

C3 contends that the referee erred, and that it is entitled to a new trial on damages. It concedes, however, that it did not move for new trial on the question.

Failure to move for a new trial "precludes a party from complaining on appeal that the damages awarded were either excessive or inadequate, whether the case was tried by a jury or a court without a jury." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 122.)

While a party may challenge legal errors relating to damages, such as incorrect jury instructions or the application of an improper measure of damages, "where the ascertainment of the amount of damage requires resolution of conflicts in the evidence or depends on the credibility of witnesses, the award may not be challenged for inadequacy or excessiveness for the first time on appeal." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.*, *supra*, 66 Cal.App.3d at p. 122; *Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 719-720.)

Based on this body of law, C3 attempts to phrase its arguments as legal arguments, that the referee erroneously "conflated the requirement that the fact of damages be reasonably certain with the proviso that the amount of damages not be speculative," and that the referee made an "overly restrictive reading of the rule that where the fact of damage has been established, the precise amount of the damage need not be calculated with absolute certainty."

C3's attempt is unavailing. Its arguments are not legal arguments; they are arguments about the evidence.

In *Glendale Fed. Sav.*, *supra*, 66 Cal.App.3d 101, there was a legal question, the proper measure of damages. (*Id*. at p. 123.) In contrast, C3's contentions are that substantial evidence did not support the referee's ruling that Madoff's opinion lacked foundation, that the referee's belief that Madoff did not use the right comparables was not supported by the evidence, and that "Sony failed to introduce evidence contrary to

Madoff's opinion." C3 thus contends that the referee wrongly evaluated the evidence. It cannot raise this contention for the first time on appeal.

3. *Evidentiary rulings*

During discovery, the referee granted C3's motion to compel responses to certain requests for production of documents, ordering Sony to produce "Any document which in any way evidences any efforts by you or on your behalf to distribute the shorts or the series for the last ten years." C3 contends that at trial, the referee allowed Sony to introduce evidence that was responsive to that demand, but that was not produced. That evidence concerned sales and pricing information for other Sony properties in the home video, syndication, and other markets; and calendars and other records reflecting meetings at which Sony contended that it tried to license the Series. C3 contends that the referee abused his discretion in allowing the documents to be admitted.

C3 also finds an abuse of discretion in one more category of evidence. It argues that in response to special interrogatories which asked Sony to state all the reasons it was unable to market the Series, Sony never claimed that poor ratings were an impediment. Yet, at trial Sony was permitted to introduce ratings information for the Playhouse Series in syndication, to the prejudice of C3, which did not have time to analyze this technical information.

Given the referee's rulings and our affirmance of those rulings, admission of records of the meetings at which Sony contends it tried to sell the Series is irrelevant. The evidence is relevant to breach, but not to damages. We say the same about the ratings information.

Documents concerning Sony's sales of other products were relevant. As C3 argues, the referee relied in part on that evidence in determining that C3 had not proved non-speculative damages for breach of the efforts clause. However, we agree with the referee that this evidence was not responsive to the request for production. Sony's sales of other products are not evidence of Sony's "efforts . . . to distribute the shorts and the series."

The Cross-Appeal: the Referee's Fees

Soon after this case was filed, Sony moved for a judicial reference, contending that the dispute fell under the Maui Settlement Agreement, which provided, inter alia, that "the Parties hereby agree that (i) any dispute arising out of this Settlement Agreement and its implementation . . . and . . . any other dispute regarding any subject whatsoever which may arise in the future [between the parties] shall be submitted to a private judge . . . pursuant to Code of Civil Procedure section 638."

C3 opposed the motion on the ground, inter alia, that the dispute did not fall under the Maui Settlement Agreement.

The Maui Settlement Agreement also provides that "Except as provided herein, each Party hereto shall bear its own attorney's fees and costs with regard to all matters arising out of Released Matters and this Settlement Agreement." C3 argued that if the motion was granted, the costs of the referee should be Sony's sole responsibility. Sony argued that the referee's fees should be divided equally between the parties. The court ruled for Sony on the issue.

The parties initially split the referee's fees, paying about $80,000 each. As prevailing party, Sony moved the trial court for costs, seeking, inter alia, $80,000, as its share of the referee's fees. C3 moved to strike or tax costs. Sony was awarded certain costs, but was not awarded its share of the referee's fees.

Judge Haley Fromholz made the order compelling the reference. A different judge, Judge Kevin Brazile, heard the costs motion. Judge Brazile ruled that while the court had the discretion to award the fees as costs (Code Civ. Proc., §§ 1033.5, 1033, subd. (b)), the order compelling the reference "reveals that referee costs were to be allocated equally between the parties. Moreover, Judge Fromholz's order does not indicate that the allocation of referee fees is temporary or provisional, and his order does not indicate that the referee costs can be recovered by the prevailing party as a cost. Therefore, in light of Judge Fromholz's order and the Maui Agreement, the court hereby declines to exercise its discretion to award referee fees as costs to the prevailing party."

Sony contends that the cost provision of the Maui Settlement Agreement does not apply to this dispute, that Judge Fromholz's order compelling the reference did not preclude an award of the referee's fees and costs, and that the fees were recoverable under Code of Civil Procedure section 645.1, and asks us to review de novo what it sees as questions of contract and statutory interpretation.

We agree with C3 that Sony is estopped from raising these arguments. "Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.]" (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987.) The doctrine applies when the same party has taken two positions in judicial proceedings, the party was successful in asserting the first position, the two positions are totally inconsistent, and the first position was not taken as a result of ignorance, fraud, or mistake. (*Ibid*.)

Sony argues that it did not take inconsistent positions on the allocation of fees, arguing first that it only asked the court to apportion fees in a "fair and reasonable manner." The phrase appears in its motion under the heading "The Fees of the Referee Should be Divided Equally Between Plaintiff C3 and the Sony/Columbia Defendants." Sony also argues that its position on fees only concerned the initial allocation of fees, not the recovery of fees as costs. Its motion does not support the argument.

Disposition

The judgment is affirmed, as is the costs order. Each party to bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, Acting P. J.

We concur:

KRIEGLER, J.

WEISMAN, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.